

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

with affidavit
75-6010

To be argued by
WILLIAM G. BALLAINE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-6010

HOWARD S. KATZ,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, DONALD ALEXANDER, Commissioner of Internal Revenue, JOHN CLIFFORD, Revenue Officer, STEPHEN J. DAVIDSON, Revenue Officer,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.*

WILLIAM G. BALLAINE,
STEVEN J. GLASSMAN,
*Assistant United States Attorneys,
Of Counsel.*

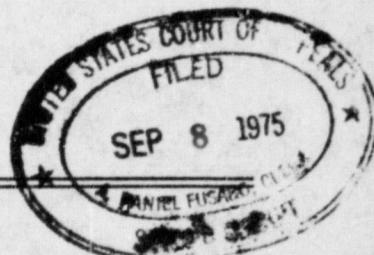


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Issue Presented	2
Facts	2
ARGUMENT:	
The District Court Properly Dismissed the Com- plaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Re- lief Can be Granted	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

<i>Alexander v. "Americans United" Inc.</i> , 416 U.S. 752 (1974)	4, 5
<i>Avco Delta Corp. Canada Ltd. v. United States</i> , 484 F.2d 692 (7th Cir. 1973), <i>cert. denied</i> , 415 U.S. 931 (1974)	8
<i>Bob Jones University v. Simon</i> , 416 U.S. 725 (1974)	4
<i>Cole v. Cardoza</i> , 441 F.2d 1337 (6th Cir. 1971)	5
<i>Collins v. Daly</i> , 437 F.2d 736 (7th Cir. 1971)	5
<i>Enochs v. Willimas Packing & Navigation Co.</i> , 370 U.S. 1 (1962)	4, 5, 8
<i>Flora v. United States</i> , 362 U.S. 145 (1960)	7, 8
<i>Hamilton v. United States</i> , 309 F. Supp. 468 (S.D. N.Y. 1969), <i>aff'd, per curiam</i> , 429 F.2d 427 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 913 (1971) ..	8

PAGE

<i>Human Engineering Institute v. Commissioner</i> , 61 T.C. 61 (1973)	8
<i>Lloyd v. Patterson</i> , 242 F.2d 742 (5th Cir. 1957)	8
<i>Martin v. Commissioner</i> , 358 F.2d 63 (7th Cir.), cert. denied, 385 U.S. 920 (1966)	7
<i>Nash Miami Motors, Inc. v. Commissioner</i> , 358 F.2d 636 (5th Cir.), cert. denied, 385 U.S. 918 (1966)	7
<i>Phillips v. Commissioner</i> , 283 U.S. 589 (1931)	5, 6
<i>Pizzarello v. United States</i> , 408 F.2d 579 (2d Cir. 1969), cert. denied, 396 U.S. 986 (1970)	8
<i>Reisman v. Caplin</i> , 375 U.S. 440 (1964)	5
<i>Stix Friedman & Co. v. Coyle</i> , 467 F.2d 474 (8th Cir.) (per curiam), aff'd, 340 F. Supp. 4 (E.D. Mo. 1972)	6
<i>United States v. Sholm</i> , 420 F.2d 263 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970)	5
<i>Williams v. Wiseman</i> , 333 F.2d 810 (10th Cir. 1964)	5
<i>Willmut Gas & Oil Co. v. Fly</i> , 322 F.2d 301 (5th Cir. 1963)	7
<i>Statutes:</i>	
26 U.S.C. § 6331	1, 3, 5, 6
26 U.S.C. § 7421(a)	3, 4, 8
26 U.S.C. § 7441	6
26 U.S.C. § 7602	1, 2, 3, 5
28 U.S.C. § 2201	3, 4, 8
<i>Rules:</i>	
Rule 12(b), Fed. R. Civ. Proc.	2

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-6010

HOWARD S. KATZ,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,
DONALD ALEXANDER, Commissioner of Internal Re-
venue, JOHN CLIFFORD, Revenue Officer, STEPHEN
J. DAVIDSON, Revenue Officer,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

Statement of the Case

This is an appeal by plaintiff-appellant Howard S. Katz from the final judgment signed March 20, 1975 by the Honorable Harold R. Tyler, Jr., United States District Judge. This final judgment was based upon Judge Tyler's memorandum, dated February 14, 1975, granting the motion of defendants to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Plaintiff had filed a complaint on May 29, 1974 which requested a declaration that Sections 6331 and 7602 of the Internal Revenue Code of 1954, as amended (hereinafter the "Code"), 26 U.S.C. §§ 6331 and 7602, are unconstitu-

tional and void and also requested an injunction prohibiting the enforcement, operation or execution of said provisions of the Code. The complaint alleged principally that plaintiff's funds had been unconstitutionally levied upon by the Internal Revenue Service (hereinafter the "IRS"). It further asserted that a summons issued by the IRS pursuant to 26 U.S.C. § 7602 violated the United States Constitution and finally that the United States Tax Court is not a "true" court under the United States Constitution before which a tax dispute may properly be resolved.

By notice of motion, dated September 9, 1974, defendants moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. This motion resulted in Judge Tyler's February 14, 1975 memorandum and the final judgment signed March 20, 1975 from which plaintiff now appeals.

Issue Presented

Did the District Court properly dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted?

Facts

Beginning in 1972, plaintiff was assessed for federal income taxes which the IRS claimed were due for the calendar years 1968, 1969 and 1970. Complaint ¶ VII. Thereafter, the IRS sent plaintiff notices of levy and seized plaintiff's bank accounts, securities and wages in order to collect the assessed taxes. Complaint ¶¶ V and VII. The IRS also served plaintiff with a summons directing him to appear before an IRS revenue officer and to

bring various documents and records all in connection with the collection of the assessed taxes. See summons attached to Affidavit of Howard S. Katz, duly sworn to May 29, 1974, in Support of Order to Show Cause. It appears that prior to commencing his action for declaratory and injunctive relief, plaintiff had not paid in full the assessed tax liability for any one of the three years in question, nor had he filed a petition for review of his tax liability in United States Tax Court. See Complaint ¶¶ VII and X; Appellant's Memorandum of Law in Support of Appeal (hereinafter "Appellant's Brief"), pp. 2-3.

ARGUMENT

The District Court properly dismissed the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff's complaint requested declaratory and injunctive relief which would prohibit defendants from exercising their statutory authority to collect federal income taxes by means of levy and distress, pursuant to 26 U.S.C. §§ 6331 *et seq.*, or to summon the taxpayer for the purpose of collecting such tax liability, pursuant to 26 U.S.C. § 7602. The authority of a District Court to provide such requested relief is severely limited by the statutory prohibition of the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the exclusion to the Declaratory Judgment Act set forth in 28 U.S.C. § 2201.

The Anti-Injunction Act, found in 26 U.S.C. § 7421 (a), provides that:

"Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1) [Tax

Court proceedings and civil actions by persons other than taxpayers], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .”

An even more broadly-stated exclusion is found in 28 U.S.C. § 2201:

“In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States . . . may declare the rights and other legal relations of any interested party. . . .” (emphasis added)

In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), the Supreme Court of the United States held that 26 U.S.C. § 7421(a) withdraws jurisdiction from a federal court to entertain suits seeking injunctions prohibiting the collection of federal taxes unless two strict conditions are met: (1) it is apparent, on the basis of information available to the Government at the time of suit, that it cannot establish its claim under the “most liberal” view of the law and the facts; and (2) the taxpayer’s claim meets the traditional requirements for equity jurisdiction. *Enochs v. Williams Packing & Navigation Co.*, *supra* at 5-7. In two recent decisions the Supreme Court reaffirmed its holding in *Williams Packing*. See *Alexander v. “Americans United” Inc.*, 416 U.S. 752, 758 (1974) and *Bob Jones University v. Simon*, 416 U.S. 725, 742-46 (1974). In *Alexander v. “Americans United” Inc.*, *supra*, the Supreme Court also observed that the scope of the “except with respect to Federal taxes” clause of 28 U.S.C. § 2201 is “at least as broad” as the prohibition of the Anti-Injunction Act. *Id.* at 759 n. 10.

To meet the strict requirements of *Williams Packing*, a plaintiff must set forth well-pleaded facts rather than

conclusory allegations of illegality. *Cole v. Cardoza*, 441 F.2d 1337, 1341-42 (6th Cir. 1971); *Collins v. Daly*, 437 F.2d 736, 739 (7th Cir. 1971); *Williams v. Wiseman*, 333 F.2d 810, 811 (10th Cir. 1964). Moreover, the constitutional nature of the plaintiff's claim, as distinct from its probability of success, is of no consequence. *Alexander v. "Americans United" Inc.*, *supra* at 759. The District Court below properly concluded that plaintiff's claims failed to satisfy the strict conditions set forth in *Williams Packing*.

Plaintiff's principal claims, as indicated in his complaint, are that the IRS's statutory authority to collect federal taxes by summary procedures and its statutory authority to serve a summons directing the appearance of a taxpayer and the production of books and records violate the United States Constitution. See Complaint ¶¶ V-XIV. However, the United States Supreme Court long ago upheld the constitutionality of the IRS's summary procedures for collecting taxes in *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931).

The Supreme Court has similarly upheld the constitutionality of the statutory scheme which authorizes the issuance of an IRS summons pursuant to 26 U.S.C. § 7602. *Reisman v. Caplin*, 375 U.S. 440 (1964). Recognizing the *Reisman* holding, the Court of Appeals for this Circuit has summarily rejected constitutional objections to a summons issued in conformity with Section 7602 of the Code. *United States v. Shlom*, 420 F.2d 263, 266 (2d Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

Underlying these decisions upholding the constitutionality of 26 U.S.C. §§ 6331 and 7602 is the fact that the taxpayer is at some point afforded a forum for the determination of his legal rights. See *Phillips v. Commissioner*, *supra* at 595-97; *Reisman v. Caplin*, *supra* at

445-50. Thus, as respects the IRS's summary authority to collect taxes, the Supreme Court has concluded that due process is satisfied because the taxpayer has available two alternative means for having his tax liability reviewed: (1) a refund suit commenced by the taxpayer after payment of the federal taxes assessed by the Government; or (2) an action commenced by the taxpayer in United States Tax Court prior to payment of the taxes in dispute. *Phillips v. Commissioner*, *supra* at 597-98.

Plaintiff contends that, notwithstanding *Phillips*, the Government's seizure of his property pursuant to 26 U.S.C. § 6331 violates his constitutional rights because the seizure was based on tax assessments which were "far beyond his ability to pay", thus precluding the availability of a refund action by plaintiff and leaving him with only one forum, the United States Tax Court. Appellant's Brief, pp. 2-3. Plaintiff asserts that leaving him with this single forum deprives him of his right to due process since the Tax Court is not part of the judicial branch of the Government.* Plaintiff even goes one step further, arguing that the United States Tax Court is constitutionally invalid. Appellant's Brief, pp. 3-6. Plaintiff's contentions, however, are without support in the case law.

The constitutionality of the United States Tax Court has been repeatedly sustained by the federal courts. *Stix Friedman & Co. v. Coyle*, 467 F.2d 474 (8th Cir.) (per curiam), aff'd, 340 F. Supp. 4 (E.D. Mo. 1972);

* Plaintiff contends that the Tax Court is an "agency" in the executive branch. Appellant's Brief, pp. 3-4. Actually, by 1969 amendment, Congress established the Tax Court as a court of record under Article I of the Constitution. See 26 U.S.C. § 7441; See also *Stix Friedman & Co. v. Coyle*, *supra*, 340 F. Supp. at 6-7.

Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir.), cert. denied, 385 U.S. 918 (1966); *Martin v. Commissioner*, 358 F.2d 63 (7th Cir.), cert. denied, 385 U.S. 920 (1966). Moreover, the Supreme Court has quite clearly acknowledged the fact that the statutory scheme provides the taxpayer with the limited choice of litigating a disputed income tax liability immediately in Tax Court *or* paying the tax assessment *in full* as a jurisdictional precondition of instituting a tax refund action in federal District Court or in the Court of Claims. *Flora v. United States*, 362 U.S. 145 (1960). In *Flora v. United States, supra*, the Supreme Court was not persuaded by the contention that requiring full payment of tax assessments as a condition of instituting a refund suit would cause the taxpayer "great hardship", observing that it "seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent." *Id.* at 175. Indeed, the Court of Appeals for the Fifth Circuit has gone so far as to hold that due process is satisfied even where Congress provides no tax refund action remedy at all, limiting the taxpayer's remedy to the Tax Court forum. *Willmut Gas & Oil Co. v. Fly*, 322 F.2d 301, 303 (5th Cir. 1963). These decisions clearly repudiate plaintiff's contention that a constitutional infirmity results because he is financially unable to bring a tax refund action and is limited to seeking review of his tax liability in the United States Tax Court.

As a final argument, plaintiff now contends on appeal that his constitutional rights are violated because the IRS's collection activities prior to adjudication of the dispute left him without funds sufficient to hire adequate legal counsel. Appellant's Brief, pp. 8-9. The courts, however, have consistently rejected the constitutional claim of a taxpayer alleging that the Government's tax collec-

tion activities rendered him unable to pay for competent legal counsel in impending civil and even criminal proceedings. *Avco Delta Corp. Canada Ltd. v. United States*, 484 F.2d 692, 706-07 (7th Cir. 1973), cert. denied, 415 U.S. 931 (1974); *Lloyd v. Patterson*, 242 F.2d 742, 744 (5th Cir. 1957); see *Human Engineering Institute v. Commissioner*, 61 T.C. 61, 67 (1973). Accordingly, this last constitutional claim of plaintiff is without merit.

In summary, it is clear from the case law that plaintiff's claims utterly fail to satisfy the strict requirements of *Enochs v. Williams Packing & Navigation Co.*, *supra*. Compare *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969), cert. denied, 396 U.S. 986 (1970) and *Hamilton v. United States*, 309 F. Supp. 468 (S.D.N.Y. 1969), *aff'd per curiam*, 429 F.2d 427 (2d Cir. 1970), cert. denied, 401 U.S. 913 (1971). There is absolutely no basis for permitting plaintiff to avoid the prohibitions of 26 U.S.C. § 7421(a) and 28 U.S.C. § 2201 by arguing that he has been assessed taxes beyond his means to pay where he has had available the forum of the United States Tax Court. As was noted by Judge Tyler, if plaintiff's resort to the Tax Court is now barred because the time for seeking such review has expired, he cannot complain that he has had no adequate remedy; he is in the same position as any other taxpayer barred by the statute of limitations. See *Flora v. United States*, *supra* at 175.

CONCLUSION

For the reasons set forth above, the judgment of the United States District Court dismissing the complaint should be affirmed.

Dated: New York, New York
September 8, 1975

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees.

WILLIAM G. BALLAINE,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-6010

State of New York } ss
County of New York }

PAULINE P. TROIA, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 8th day of September, 1975, he served ~~copy~~ two copies of the within
brief of deft's appellees
by placing the same in a properly postpaid franked envelope
addressed:

Howard S. Katz,
85 4th Ave. #6M
New York, NY 10003

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

8th day of September 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977.

